

Decision D0112024 – Published in note form only

Re Keeley and PathWest Laboratory Medicine WA [2024] WAICmr 11

Date of Decision: 29 August 2024

Freedom of Information Act 1992 (WA): section 26

On 28 July 2023, Wilora Keeley (**the complainant**) applied to PathWest Laboratory Medicine WA (**the agency**) under the *Freedom of Information Act 1992 (WA)* (**the FOI Act**) for access to documents concerning a deceased family member’s pathology results and related communications.

By notice of decision dated 5 September 2023, the agency refused the complainant access to the requested documents on the ground they were exempt under clause 3(1) of Schedule 1 to the FOI Act (**clause 3(1)**).

The complainant applied for internal review of the agency’s decision and provided additional information about the documents she requested. By internal review decision dated 27 September 2023, the agency varied its initial decision and gave the complainant access to an additional document. The agency otherwise maintained its decision to refuse the complainant access to documents under clause 3(1).

On 28 September 2023, the complainant applied to the Information Commissioner (**the Commissioner**) for external review of the agency’s decision.

The agency provided the Commissioner with its FOI file maintained in respect of the complainant’s access application. During the external review, the agency reconsidered its decision to refuse the complainant access to documents under clause 3(1) and gave the complainant access to various documents.

As it appeared the agency had not conducted searches for all documents within the scope of the complainant’s access application, the Commissioner requested further information from the agency about its searches and required additional searches to be undertaken. The agency provided the requested information and conducted additional searches, which located further documents. The agency gave the complainant access to those further documents. However, the complainant claimed additional documents existed within the scope of her access application. That was, in effect, a claim the agency had refused the complainant access to documents under section 26 of the FOI Act (**section 26**).

On 22 April 2024, the Commissioner provided the parties with her preliminary view, which was that, based on the information then before her, the agency’s decision to refuse the complainant access to additional documents under section 26 was justified. The complainant did not accept the Commissioner’s preliminary view and provided further submissions.

Section 26 provides that an agency may refuse access to a document if all reasonable steps have been taken to locate the document, and it is satisfied that the document is either in the agency’s possession but cannot be found or does not exist. The Commissioner considers, in dealing with section 26, the following questions must be answered. First, are there reasonable grounds to believe the requested documents exist, or should exist? Second, are

the requested documents, or should the requested documents be, held by the agency? Where either of those questions is answered in the affirmative, the next question is, has the agency taken all reasonable steps to locate those documents?

As observed in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps. The adequacy of an agency's efforts to locate documents is to be judged by having regard to what was reasonable in the circumstances: see *Re Leighton and Shire of Kalamunda* [2008] WAICmr52 at [85] and *Re Veale and City of Swan* [2012] WAICmr 12. In *Lee v Department of Justice* [2020] WASC 105, Justice Archer observed that there is an interrelationship between the reasonableness of searches and the likelihood that a document exists.

The complainant contended additional documents should exist, primarily because she asserted the agency's own operating procedures suggested certain record keeping practices require the creation of certain documents. However, the agency advised the documents in question were not created at the relevant time. On the information before her, the Commissioner was not persuaded there were reasonable grounds to believe additional documents exist.

The complainant also claimed the agency had not taken all reasonable steps to locate the additional documents and suggested other search terms the agency could use to locate documents within the scope of her access application. Noting that section 26 requires an agency to take all reasonable steps to locate documents, not all steps, the Commissioner did not require the agency to undertake the further searches suggested by the complainant.

The Commissioner recognised that, when additional documents are located by an agency after further searches, as was the case in this matter, it is understandable that an applicant may be sceptical about the adequacy of the agency's efforts to meet its obligations under the FOI Act in the first instance. However, the Commissioner was satisfied on the information before her that the agency had complied with its obligations under the FOI Act in this matter.

After considering all the material before her, including the searches undertaken by the agency and the complainant's further submissions, the Commissioner was satisfied that the agency had taken all reasonable steps in the circumstances to locate the requested documents and additional documents either could not be found or do not exist.

Accordingly, the Commissioner found the agency's decision to refuse the complainant access to additional documents under section 26 of the FOI Act is justified. Therefore, the Commissioner confirmed the agency's decision.